Filed May 24, 1976

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1382

THE OMAHA NATIONAL BANK,

Petitioner,

vs.

NEBRASKANS FOR INDEPENDENT BANKING, INC., et al.,

Respondents.

SUPPLEMENTAL MEMORANDUM OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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I N D E X

CONSTITUTION CITED

CASES CITED

QUESTION TREATED

The Court has requested that Respondents comment on the applicability of the enactment of Legislative Bill 763, Eighty-Fourth Legislature, Second Session, State of Nebraska, to the matter presently under consideration.

If L.B. 763 were a valid enactment of law, the issues presented would be moot; however, the law is void as having been enacted in contravention of the requirements of the Nebraska Constitution and is thus of no force and effect.

LEGISLATIVE FACTS

Art. III, Sec. 14, of the Nebraska Constitution reads as follows, in pertinent part:

> Every bill and resolution shall be read by title when introduced, and a printed copy thereof provided for the use of each member, and the bill and all amendments thereto shall be printed and read at large before the vote is taken upon its final passage. No such vote upon the final passage of any bill shall be taken, however, until five legislative days after its introduction nor until it has been on file for final reading and passage for at least one legislative day. No bill shall contain more than one subject, and the same shall be clearly expressed in the title.

The specific question is whether the passage of L.B. 763 violated the requirement that no bill shall be passed until five legislative days after its introduction.

The facts and circumstances surrounding the enactment of L.B. 763 are as follows:

L.B. 763 was first introduced on the floor of the Legislature on the sixth legislative day, January 14, 1976. The bill as introduced related only to the ability of state chartered building and loan associations to have the same powers as federally chartered savings and loan associations. (See Appendix A, infra.)

A public hearing was had on the language of that bill on January 27, 1976, before the Banking Commerce and Insurance Committee. The bill was then placed on general file on the twentieth legislative day, February 3, 1976 with a proposed amendment which would have delegated to the Director of Banking the power to make rules granting state building and loan associations the same power as federal savings and loan associations. (See Appendix B, infra.)

On the thirty-sixth legislative day, February 26, 1976, the Legislature rejected the amendment proposed by the committee. On the thirty-eighth legislative day, March 1, 1976, the bill was placed on Select File at which time Senator Schmidt obtained consent to print the amendment found in Appendix C, infra. Thus, for the first time, on March 1, 1976, language relating to commercial bank branching was introduced into the bill.

On the next day, March 2, 1976, the thirty-ninth legislative day, Senator Schmidt renewed his amendment; it was adopted, and the bill was advanced for engrossment. On that same day, Senator Schmidt obtained consent to expedite the bill and the bill as amended was adopted. (See Appendix D, infra.)

Not only was the body of L.B. 763 substantially amended, the title was substantially amended. When L.B. 763 was originally introduced, the title read as follows:

> A bill for an act to amend Sec. 8-355, Rev. Stat. Supp., 1975, relating to building and loan associations; to provide the same advantages as federal savings and loan associations; and to repeal the original section.

As finally passed, the title of L.B. 763 read as follows:

> A bill for an act relating to financial institutions; to provide what shall constitute an attached auxiliary teller office; to provide rights, powers, privileges, benefits, and immunities of state building and loan associations; to amend sections 8-157 and 8-355, Revised Statutes Supplement, 1975; and to repeal the original sections.

The title of an act is amendable in the same way, and under the same strictures, as the body of the bill. One case has held that a material change in the title of a bill after it has passed the legislature and before its presentation to the governor, renders the act unconstitutional. Weiss vs. Ashley, 59 Neb. 494, 81 N.W. 318 (1900).

Thus L.B. 763 was passed two days after introduction of the amendment relating to auxiliary teller offices of commercial banks under a title which treated two subjects one of which was unrelated to the original bill.

APPLICABLE LAW

It will be helpful to keep in mind that many of the cases, both in Nebraska and elsewhere, speak in terms of a bill being

read three times on separate days before it can be validly passed. That is the procedure in most states and was the procedure in Nebraska prior to the advent of the one house legislature. Art. III, Sec. 14 quoted above, read as follows:

> Every bill and concurrent resolution shall be read at large on three different days in each house, and the bill and all amendments thereto, shall be printed before the vote is taken upon its final passage.

With the advent of the Unicameral, this procedure obviously had to be changed. The new constitutional section replaced the three-reading rule with a five-day rule.

Though a bill may be amended during the course of its enactment, the amendment must be "germane" to the original bill. "Germane" is defined in Nebraska as "akin", "closely allied", "pertaining to", or "related to". Wayne County vs. Steele, 121 Neb. 438, 237 N.W. 288 (1931). When an entirely new bill is substituted by amendment, the changes by way of amendment must be "strictly germane" to the original bill. In State v. Cox, 105 Neb. 75, 178 N.W. 913, the Nebraska Supreme Court stated:

> The method of substituting an entire new bill by amendment, when the changes by way of amendment are strictly germane to the original, is not unconstitutional, is in accord with universal legislative procedure, and it is unnecessary that a bill, which has been read the first and second time before such amendment, shall be again placed on first and second reading before passage. [emphasis added]

Stated another way, Gypsum Company vs. State Department of Revenue, 110 N.W. 2d 698 (Mich. 1961), held the test of

germaneness is whether the change represents an amendment or extension of the basic purpose of the original, or is an introduction of entirely new and different subject matter.

Thus, under Nebraska law the vital question in regard to the amendment of the title or the body of a bill, or both, is whether the changes made are "germane" to the original bill.

L.B. 763 started out to be a bill solely concerned with building and loan associations. The title was later changed, along with the body of the bill, to encompass a part of the commercial banking law. It should be noted that commercial banks and building and loan associations have different substantive statutory rules, that these rules are found in different sections of Chapter 8 of the Nebraska Statutes, and that the rules and regulations concerning commercial banks and building and loan associations are distinct and materially different. The precise question then becomes: Was the introduction of a section relating to commercial banking germane to the original bill concerning building and loan associations? In other words, was the amendment a constitutional change in the bill or an unconstitutional transmogrification?

No Nebraska case directly on a point has been found. However, cases which are on point from other jurisdictions establish that the legislature engaged in an unconstitutional transmogrification.

In Giebelhausen vs. Daley, 407 Ill. 25, 95 N.E. 2d 84 (1950), quoting at length from published opinion, the Illinois Supreme Court stated as follows:

> Sec. 13 of Article IV, of the constitution, provides that every bill shall be read at large on three different days in each House. And it is the contention of appellant that under the facts above this constitutional provision was not observed, and consequently the appropriation bill is invalid. This provision is clear and concise, - "every bill shall be read at large on three different days, in each house;" and it has been held by this court that a failure to observe this constitutional requirement shall render the bill void.
>
> However, amendments germane to the subject matter may be made without the proposed act, as amended, being read three times in each House. In order to come within the rules an amendment need not be read three times in each House, it must be germane to the general subject of the bill as originally introduced.
>
> The term germane, is defined***in the following language: "Literally, 'germane' means 'akin,' 'closely allied.' It is only applicable to persons who are united to each other by the common tie of blood or marriage. When applied to inanimate things, it is, of course used in a metaphorical sense, but still the ideal of a common tie is always present. Thus, when properly applied to a legislative provision, the common tie is found in the tendency of the provision to promote the object and purpose of the act to which it belongs.
>
> While it is true that the title of a bill has been held not to be an essential part of it, it is a part of the law when enacted. It is in order, therefore, to examine the language of the original bill to ascertain whether the one finally adopted is the original bill, properly amended, or a substituted bill, dealing with a new subject matter.
>
> The original bill was to appropriate money for refunds to taxpayers, in accordance with a certain provision of the Motor Fuel Tax Act (Ill. Rev. Stat. 1947, Chap. 120, par. 429,) which authorized refunds in certain cases. After this bill had been adopted in the Senate, after three separate readings, every word of the original bill was stricken,

except the number thereof, "687," and the first words, "A Bill," and then there was added to this number and the words "A Bill" new language, which provided for the salaries and expenses to be paid by the Revenue Department in the Property Division, to be incurred under the amendment to the Revenue Act. This is claimed by the Attorney General to be an amendment, and is said to be germane to the original bill.

The object of the constitutional provision is to keep the members of the General Assembly advised of the contents of the bills it is proposed to enact into law, by calling them specifically to their attention three several times, on three different days. For this court to hold a new bill, which bears no similarity to that originally introduced, except only the appropriation for a different purpose, is germane to the original, would render this clause of the constitution nugatory by construction, and invite disregard of its salutary provision.

We think there is a complete substitution of a new bill under the original number, dealing with a subject which was not akin or closely allied to the original bill, and which was not read three times in each House, after it had been so altered, in clear violation of Sec. 13 of Article IV of the constitution. [Citations omitted; emphasis in original]

The Giebelhausen case clearly stands for the proposition that a new bill cannot be substituted for an old bill when the new material is not germane. An addition of new material concerning commercial banking to a bill concerning building and loan associations, is an unconstitutional attempt to evade the strictures of Art. III, Sec. 14, Nebr. Const.

The Giebelhausen case emphasized that the two subjects must be "akin" or "closely allied". This corresponds to the definitions used in the Wayne County case, supra. Building and loan associations and commercial banks are not akin or closely allied. As mentioned previously, each is chartered under different statutes for different purposes, each has different substantive rules and procedural regulations; each has different functions and goals; and, activities permitted to one are denied

to the other. The import of the Giebelhausen case is obvious: when two subjects neither akin or closely allied are fused together, a new bill results. And when a new bill results, it must follow the legislative procedures required of any other new bill; anything less creates a constitutionally infirm and void law.

At the time of State vs. Nashville Baseball Club, 159 S.W. 1151 (Tenn. 1913), Tennessee had a constitutional provision stating that every bill had to be read once on three different days in each legislative chamber before passage. The court stated, quoting at length from the published opinion:

> The journals of the House and Senate show that a bill to prevent baseball playing on the Sabbath was introduced in the House, passed two readings, and was referred to a committee. There was some delay about the report on the bill from the committee, and a like bill was introduced in the Senate, entitled "an act to prevent baseball playing on the Sabbath."
>
> The bill introduced in the Senate passed two readings, but when called up on the third reading an amendment to the bill was adopted to the effect that after the word "baseball" therein, there should be added the words "cricket or any other game that is played with a ball, bat or club." Following this addition and amendment, the caption read:
>
> > An act to prevent the playing of the games of basketball, cricket or any other game that is played with ball, bat or club on the Sabbath, and to prescribe the punishment therefor.
>
> In the body of the bill thus amended the playing, not only of baseball, but of cricket and other games played with ball, bat, or club, was made unlawful on the Sabbath.
>
> After the bill was so amended in the Senate, it passed another reading and was then sent to the House, where, giving the action there had the construction most favorable to the validity of the act, this Senate bill was substituted for the House bill and passed the House.

The foregoing was the manner in which Chapter 147 of the Acts of 1885 came into our statute books. It is said that this act was not passed on three readings on three days in either the House or Senate, as the Constitution requires.***

As introduced in the Senate, the bill only prohibited the playing of baseball on the Sabbath day. In this form it passed two readings. Before passing its third reading, however, it was amended so as to prohibit on the Sabbath day, not only the playing of baseball, but cricket and all other games played with ball, bat, or club. Obviously such an amendment could not have been properly introduced on the original caption of the bill, and the caption was likewise amended, so as to cover an enactment, not only against baseball, but cricket and all other games played with ball, bat or club.

Baseball is a game entirely distinct from cricket, and entirely distinct from many other games played with ball, bat or club. Legislation respecting baseball would not have covered these other games. So when the baseball bill was amended, so as to include the other games, it became entirely a new bill. It was a baseball bill no longer.

This fact was evidently recognized by the Senators, when they made a change in the caption of the bill to cover the new matters added thereto. Whenever the caption of a bill is materially changed, the bill becomes a new one. There may be additions to the caption of matters, germane and explanatory, by way of making the title more definite, which will not change the identity of the bill. If, however, there is added to the caption entirely new and foreign matter, the caption and the bill will lose their identity.

When the caption is thus radically changed, and the bill thus becomes a new one, it must pass three readings after it is so changed in order to become a valid constitutional enactment.

This question has been fully considered by this court, and our conclusions have been expressed, in Erwin vs. State, 116 Tenn. 71, 93 S.W. 73, by the present Chief Justice, as follows:

> Every bill has two parts, the title and the body. The title must contain the

subject of the proposed legislation and that subject must be single. This was intended to serve a two-fold purpose. The subject must be expressed in the title, so that the members of the Legislature have their attention drawn directly to the matter about which they are to concern themselves in the discharge of their legislative duties. A second purpose is that the people of the state may know what their representatives are doing and may interpose if they choose by petition or remonstrance. The title must be single, to prevent omnibus legislation and log rolling.

It is obvious that to serve these purposes, the title must be a constant quantity, not subject to amendment, or at least not subject to any alteration that will affect any substantial change in it. It fixes the identity of the bill. There may, indeed, be made a substantial change in a title; but, if so, it becomes a new title, the caption of a new bill.

What is said in the constitutional provisions quoted concerning amendments refers to the body of the bill. This, as a matter of course, may be amended in the house in which the bill originated. The Constitution also permits amendments to be engrafted upon it in the other House. No restriction is placed upon this power of amendment, further than results from the rigidity of the title and the necessity of conforming thereto, and the requirement that there shall be a concurrence of the two houses upon the whole bill. One section may be stricken out, and its place supplied by another containing a different provision. All may be stricken out, except the title and the enacting clause, and new provisions inserted quite different than those which first constituted the body of the bill; but upon this liberty there rests one unyielding limitation, one imperious requirement. Every amendment, be it great or small, must harmonize with the title, must be germane to it, must fall within its scope.

If an amendment foreign to the title be introduced one of two results must follow:

> Either the title must be so altered as to embrace it, or the bill as it stands, will be vitiated by it; but if the title be so changed the bill is no longer the same. The title is new, and the bill is radically different from the thing it was before.
>
> This bill, therefore, prohibiting the playing of baseball, cricket, and all other games with ball, bat, or club, never passed three readings in the Senate. It only passed one reading in the Senate, and was not enacted as prescribed by section 18 of article 2 of the Constitution.

The implications of the Nashville Baseball Club case for the present situation, again, are obvious. What happened in that case was almost identical to what happened in the instant case. Commercial banking activities are no more akin to building and loan activities than are baseball and cricket like each other.

Finally, Gronert vs. People, 95 Col. 508, 37 P. 2d 396 (1934) held that where the purpose of a bill, as introduced by the legislature, was to "license" and to regulate the business of making small loans at a greater rate of interest than 12% per annum, amendments changing the original purpose so as to forbid the licensing and regulating of the business of making small loans at interest rates greater than 1% of month, was an unconstitutional change of the original bill.

Just as in Gronert a bill to regulate the small loan business could not be converted into one which in effect prohibited such a business, neither can a bill dealing with the general powers of building and loan associations be changed into one which controls the branching activities of commercial banks.

The five-day rule is designed to let the people of Nebraska know what their representatives are doing and enable them to resist a legislative effort if they so choose. To allow a bill dealing with one topic to be converted into one which deals with another topic, frustrates that purpose.

The title of a bill must contain the subject of the proposed legislation which subject must be single. In the absence of such a requirement, a legislator's attention would not be drawn directly to the matter about which he is to concern himself.

What was done in the case of L.B. 763 deprived the citizens of Nebraska the opportunity to be heard and to explain the philosophy behind limiting branching powers. It gave no opportunity to explore the economic impact the enactment would have upon the banking community and upon the citizens of the state.

The bill was simply the result of the raw exercise of power by the state's largest bank so as to convert its illegal activity into a lawful one. The power was exercised with reckless indifference to the constitutional safeguards provided the citizens of the State of Nebraska; and, as such, the legislation is invalid.

CONCLUSION

Though respondents cannot in good conscience argue that the issues presented by the within appeal are moot, the Petition for Writ of Certiorari to the United States Court

of Appeals for the Eighth Circuit should be denied for the reasons stated in Respondents' brief, heretofore filed.

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